THE POSITION OF A TRUSTEE IN BANKRUPTCY WITH REFERENCE TO INVALID TRANSFERS OR LIENS.

The Bankruptcy Act of 1898 has provided in Section 67a that:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

And, further, in the end of Section 67e:

"And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of a petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory or District in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

And further, in Section 70a:

"The trustee of the estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt . . . to all . . .

(4) Property transferred by him in fraud of his creditors;

(5) Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him . . ."

And, finally, in Section 70e:

"The Trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a *bona fide* holder for value prior to the date of the adjudication . . ."

How do these provisions affect the case of a transfer or encumbrance of property which is, or may be, void under the law of the State where the property is situated? It would seem that the intention of Congress was to give a trustee in bankruptcy the widest powers to avoid such transfers or encumbrances, and that any interpretation of the law which resulted in restricting such power would be unnatural and unauthorized. Yet there have been well-considered cases which have upheld a narrower doctrine, though the subject is yet in a confused and unsatisfactory state.

The cause of the confusion lies in the distinction pointed out by Ray, District Judge, in Matter of Beede,[1] between a creditor having a right to avoid a mortgage, and being in a position to do so. That is, each state, besides laying down certain rules as to what encumbrances or transfers are invalid as to creditors, lays down also certain rules as to what classes of creditors may take advantage of the invalidity. In a few states, for instance, only creditors whose claims arose subsequent to the conveyance or incumbrance in question are allowed to question its invalidity; in a few states any and all creditors may take advantage of it, while in the large majority of states it is held that the language of the statute making certain instruments "void as to creditors" refers to execution or attachment creditors. The last position seems much the best, founded as it is on considerations of justice and public policy. For it would be manifestly unwise and impolitic to allow anyone to bring an action affecting the ownership of property, with all the possibilities of interfering with the use and enjoining the transfer of it, unless he had proved that he actually was a creditor, by obtaining a judgment, or had otherwise entitled himself to the extraordinary remedy of attachment.

Such is the reason of the rule requiring that certain conditions be complied with before a creditor may sue to set aside a mortgage or conveyance. How does that reason affect a trustee in bankruptcy, and how is the rule to be applied to him? He cannot, in the nature of things, obtain a judgment against the bankrupt, or get out an attachment against his property. Is he, then, to be denied the right

[1] (1903) 126 Fed. 853, 11 A. B. R. 387.

to set aside instruments which are void as against creditors, and this although he is the representative of creditors, and is vested with the obligation of protecting and enforcing their rights? Is such a result consistent with the intention of Congress, or even with the language of the Bankruptcy Act? It would seem that the mere asking of the question was sufficient to answer it. Yet there are cases on both sides.

The confusion is undoubtedly due to certain decisions under the Act of 1867, and to a failure to appreciate the very important modifications introduced by the new act. The leading case under the earlier act is Stewart *v.* Platt.[1] There a chattel mortgage was given by the bankrupts which was not filed as required by the New York law. It was, therefore, expressly declared by the State statute to be absolutely void as to creditors. Was it void as to the trustee (then called assignee) in bankruptcy? The court held not, for the reason that the trustee occupied the position of the bankrupt himself, and as the mortgage was valid as against the bankrupt, it was valid as against his trustee. The court quotes its own language in the earlier case of Yeatman *v.* Savings Institution, as follows:[2]

> "Except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens, or encumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt. He takes the property in the same 'plight and condition' that the bankrupt held it."

And the Court proceeds:

> "The assignee took the property subject to such equities, liens, or encumbrances as would have affected it, had no adjudication in bankruptcy been made."

In that case certain creditors had obtained attachments against the property, and their judgments were ordered paid out of the funds arising from the sale of the property, the balance going to the mortgagees.

In this method of distribution of the fund we may notice one of the very important changes introduced by the Act

[1] (1879) 101 U. S. 731. [2] (1877) 95 U. S. 764.

of 1898. At present all attachments against the bankrupt's property which were obtained within the four months period are vacated by the filing of the petition, unless the court shall order them to be preserved for the benefit of the estate. If, therefore, under the present act the trustee be allowed to avoid the chattel mortgages in a case like Stewart *v.* Platt, he would take the property free from all liens, attachment or otherwise. If, on the other hand, it be held that he stands so far in the position of the bankrupt that he cannot avoid the mortgage, the attachments may nevertheless be ordered preserved for the benefit of the estate, and the trustee will take the fund realized by such attachments for distribution among all the creditors. This result is expressly recognized in Thompson *v.* Fairbanks,[2] and enforced as to a judgment creditor in Re Economical Printing Co.,[3] although it is believed that the latter, at least, of these decisions is incorrect on the main point involved.

It is evident, however, from this minor point, what a long step in advance the Act of 1898 has made over the previous Bankruptcy Act. For the fundamental object of a bankruptcy statute is to insure absolute equality in the distribution of the property of an insolvent debtor among his creditors.[4] All other objects should be subordinated to this one. And in the large majority of cases, the filing of a petition has been preceded by judgments or attachments procured by certain creditors, so that we may frequently expect to find cases where the provision subrogating the trustee to the rights of such lien creditors will be of material assistance in promoting the most complete and equitable distribution of the assets, always supposing, however, that the trustee himself is not to be allowed to avoid the transfer or encumbrance.

This instance will serve to show the general tendency of the Act of 1898, and the general purpose of its framers in making it broader and more equitable, though also somewhat more radical, than the Act of 1867.

[1] Sec. 67f. See also the end of Sec. 67c.

[2] (1905) 196 U. S. 516, 13 A. B. R. 437.

[3] (1901) 110 Fed. 514, 6 A. B. R. 615.

[4] See Pirie *v.* Chicago Title and Trust Co. (1900) 182 U. S. 438, 449.

But the main question is whether or not, under the present statute, the trustee is to be allowed to avoid mortgages such as the one in Stewart *v.* Platt. It is believed that the change upon this point has been quite as sweeping as the change in distribution just mentioned. The language of Section 14 of the earlier act is far narrower than that of the present act and shows an intention to vest the assignee with the bankrupt's title and little, if anything, more. The quotation just given from Stewart *v.* Platt is as complete and fair a statement of the old rule as can be made. But it is thought that the sections of the Act of 1898 quoted at the head of this article were intended to change the old rule, and should be so construed by the courts. Sections 67a and 70e may not have gone far beyond the old law, and may be held to justify the result reached under the old law, on the ground that the word "creditors" as used in those sections refers to attachment or execution creditors and not to general creditors without a specific lien. But such a construction is believed to be forced and unnatural. As has been pointed out above, the reason for requiring judgment or execution was to prevent interference with property rights,—presumptively valid,—until the plaintiff had proved his right, or debt, against the supposed real owner of the property. In the case of a trustee in bankruptcy, the premise formerly required becomes an axiom. The trustee represents all creditors, collectively and indifferently. He exists only because creditors exist and for their benefit. There may be, in certain proceedings, questions as to what individuals are, or are not, creditors. But there can never be a question as to whether or not creditors exist, for we imagine that there can be no bankruptcy jurisdiction without creditors.

There would appear, therefore, to be no inherent reason why a trustee should take any preliminary steps before being allowed to bring an action to set aside a fraudulent conveyance or incumbrance. There is, further, the apparent absurdity of a trustee's bringing a civil action against his bankrupt, for the purpose of reaching a judicial determination upon a point already passed upon by the referee in bankruptcy,—namely, the amount of the bankrupt's debts.

But beyond these highly artificial reasons lies one which will undoubtedly be considered the most important. Before the enactment of the Bankruptcy Act each creditor had a right, first, to obtain judgment and issue execution, and then, to proceed against the fraudulent transfer. This right was an absolute one and could originally have been limited by nothing save the Statute of Limitations. The Bankruptcy Act has taken away this right of the creditor, at least as to dischargeable debts. It has, therefore, deprived him of a very important remedy, often perhaps his sole or his most important one, without any corresponding advantage unless it has transferred that remedy to the trustee. Aside from the roads to fraud which such a construction of the Act might open up, we must remember that the whole purpose of the Act would be, as to such assets, defeated. It was never intended that the Bankruptcy Statute should confirm the title of persons holding property in fraud of creditors, whether the fraud be actual or constructive. It was never intended that it should withdraw from the bankrupt's creditors property justly applicable to his debts. That the trustee was not to be deprived of rights which creditors might, whether in the present or future have exercised, is, it is believed, further indicated by the language of Sections 67e and 70a (5) which, although they also may be explained as using the word "creditors" in what is considered an unnatural sense,—yet seem to go farther than any other clauses in indicating the intention of Congress.

Attention should, perhaps, be called here to the suggestion of the Court in Re Economical Printing Co.,[1] that the right of the creditor to attach voidable transfers of property is not absolute, as suggested above, but is limited by the power of the debtor to make an assignment for the benefit of creditors, or to surrender possession of the mortgaged property to the mortgagee. As to this it is, perhaps, sufficient to say first that, either of such acts becomes in its result, an actual, and often an intentional fraud on creditors, which ought never to be permitted, and, second, that such results were among those particularly aimed at by the

[1] (1901) 110 Fed. 514, 6 A. B. R. 615.

Bankruptcy Act, and the fact of their previous existence is certainly no ground for their present continuance.

For such reasons, therefore, it is believed, not only that Congress intended that a trustee should have power to avoid any transfers or incumbrances which any creditor might in the present or future avoid,—not only that the intention of Congress was so expressed that the courts should have carried it into effect,—but also that every consideration of justice and equity was present to induce such a decision if the Statute left the law in doubt.

Let us now consider some of the most important decisions on the question.

In the first place it may be noted that certain decisions, which apparently bear upon this point, have really little or nothing to do with bankruptcy law, but depend entirely upon the interpretation of State statutes. Such are Hewit *v.* Berlin Machine Works,[1] Gove *v.* Morton Trust Co.,[2] In re Josephson,[3] In re Shirley[4]. With these and similar cases we are not concerned.

We come then to a small class of cases where a mortgage of property was originally invalid under the State law, but the invalidity has been cured by the mortgagee taking possession of the property before adjudication in bankruptcy or before any creditor had obtained a lien against the property. In the case of Ethridge *v.* Sperry[5] the Supreme Court of the United States held that the validity of chattel mortgages was governed exclusively by the laws of the State in which the mortgaged property was situated. This case has been repeatedly quoted and approved. It has been thought to require the decision that a mortgagee taking possession of the mortgaged property before the vesting of other rights, was entitled to keep the property where that result would have followed under the State law. The result is one which it is believed the Bank-

[1] (1904) 194 U. S. 296, 11 A. B. R. 709.

[2] (N. Y. 1904) 96 App. Div. 177, 12 A. B. R. 297. It should be noticed that in this case the New York Court reached a different conclusion as to what the New York law was from that reached by the Circuit Court of Appeals, in the Economical Printing Co. case—(1901) 6 A. B. R. 615.

[3] (1902) 116 Fed. 404, 8 A. B. R. 423.

[4] (1901) 112 Fed. 301, 7 A. B. R. 299.

[5] (1891) 139 U. S. 266.

ruptcy Act was intended to prevent. It is in a high degree inequitable, and seems to us to permit an unlawful preference. It is upheld, however, in Re Antigo Screen Door Co.,[1] and in Thompson *v.* Fairbanks[2]. The latter case will be discussed more fully later, but the result seems unfortunate, and the decision in such cases as In re Ball[3] and Matthews *v.* Hardt[4] seems much to be preferred. The question is, however, somewhat beyond our limits.

The remaining cases group themselves into two divisions, first, those involving conditional sale contracts, or chattel mortgages, where the purchaser or mortgagor has a right to sell the property, and secondly, other cases of incumbrances or transfers which, though invalid, can only be attacked by lien creditors. We believe that under Section 70a (5) the trustee should be allowed to avoid all transfers or encumbrances in the first group, since the bankrupt could have sold the property. The question has, however, not always been treated so simply by the courts, and we may, therefore, conveniently discuss the two classes together, so far as they involve the requirement of a lien creditor under the State law, and the status of a trustee in bankruptcy, as such creditor under the Federal laws.

As long ago as the case of Bank *v.* Sherman,[5] decided under the Act of 1867, the Supreme Court held that "the filing of the petition was a *caveat* to all the world. It was in effect an attachment and injunction." The language has been quoted as equally true under the Act of 1898. Mueller *v.* Nugent,[6] and other cases. It should therefore have been perfectly possible to treat a trustee in bankruptcy as an attaching creditor, and to allow him all rights which such a creditor would have; but this has not always been done.

The first important case under the present Act is In re Economical Printing Co.,[7] decided by the Circuit Court of Appeals, Second Circuit, in 1901. It was a case of a

[1] (1903) 123 Fed. 249, 10 A. B. R. 359, 366 (the second point in the case).

[2] (1905) 196 U. S. 516, 13 A. B. R. 437. [3] (1903) 10 A. B. R. 564.

[4] (N. Y. 1903) 79 App. Div. 570, 9 A. B. R. 373.

[5] (1879) 101 U. S. 403. [6] (1902) 184 U. S. 1, 7 A. B. R. 224.

[7] 110 Fed. 514, 6 A. B. R. 615.

chattel mortgage, improperly recorded under the New York law, and the Court decided that under that law only attachment or execution creditors (which will hereafter, for convenience, be called lien creditors) could take advantage of the omission. After quoting some of the sections of the present Bankruptcy Act, the Court proceeds:

"The Bankrupt Act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors at the time when the trustee's title accrues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. . . . The provisions which have been quoted do not necessarily touch a lien which at the date of the adjudication of bankruptcy was valid as to the bankrupt, and could not then be disturbed by any of his creditors. The lien of the present mortgage would not have been valid as against the claims of the creditors, within the terms of Subdivision 'a,' [Sec. 67] if the creditors had obtained a right to question it, but otherwise it was valid."

The Court seems to us to have followed too closely the decisions under the Act of 1867.

Some three months later, the Circuit Court of Appeals for the Eighth Circuit came to a different conclusion in the case of Re Pekin Plow Co.[1] That was a case of a chattel mortgage or conditional sale contract, which was invalid as to creditors by the Nebraska law, but which could only be avoided by lien creditors. The Court holds that by instituting proceedings in bankruptcy "the creditors 'are using the courts of law and their processes for the collection of their debts,' and the creditors thereby make an effectual seizure of the property of the bankrupt within the true meaning of the decisions of the Supreme Court of Nebraska hereinbefore referred to. . . . The decisions relied upon by counsel for petitioner, construing the former act, are of little aid in construing the provisions of the present act." The trustee in bankruptcy was, therefore, allowed to hold the property in question free from any liens.

We next come to In re Garcewich,[2] decided by the Circuit Court of Appeals, Second Circuit, in April, 1902. It was a similar case to Re Pekin Plow Co., and the Court distinguishes the Economical Printing Co. case on the

[1] (1901) 112 Fed. 308, 7 A. B, R. 369. [2] 115 Fed. 87, 8 A. B. R. 149.

ground that a contract of sale reserving title in the vendor, but allowing the vendee to sell the property, " was intended by the parties, or presumed by law to be intended, as a fraud upon creditors or purchasers." The result of this is, of course, greatly to limit the effect of the Economical Printing Co. decision, and in fact this case is expressly decided upon the language of Section 70a (5).

In re Antigo Screen Door Co.,[1] a chattel mortgage allowing the mortgagee to sell was held to be fraudulent in fact under the Wisconsin law, to be voidable by an assignee in insolvency and, therefore, by a trustee in bankruptcy.

In Chesapeake Shoe Co. *v.* Seldner,[2] the Court, discussing a contract similar to the one in the Pekin Plow Co. case, says: " If it be conceded that the creditors in whose favor the statute makes void the condition in an unrecorded contract are only creditors in a condition to subject the property (that is, lien creditors), yet under the Bankrupt Act, the filing of a petition in bankruptcy is in effect an attachment levied in behalf of all the bankrupt's creditors." Citing Bank *v.* Sherman, Mueller *v.* Nugent, and Pekin Plow Co.[3]

And in re Rogers,[4] the Circuit Court of Appeals for the Seventh Circuit says:

> " The filing of the petition, followed by seizure and by adjudication in bankruptcy, is a seizure of the property by the law for the benefit of creditors, and an appropriation of it to the payment of the debts of the bankrupt. It is a seizure of the property by legal process, equal in rank to, and of the same force and effect as, by execution or attachment."

In re Ducker (Re F. B. Shuster Co.),[5] the Circuit Court of Appeals for the Sixth Circuit had to deal first with the Kentucky Law. The case was a conditional sale, which was treated as subject to the same principles as a chattel mortgage. It had not been filed. The Kentucky law was decided to be that only subsequent creditors who became

[1] (1903) 123 Fed. 249, 10 A. B. R. 359, 365 (Circuit Court of Appeals, Seventh Circuit).

[2] (1903) 122 Fed. 593, 10 A. B. R. 466 (Circuit Court of Appeals, Fourth Circuit).

[3] Supra. [4] (1903) 125 Fed. 169, 11 A. B. R. 79.

[5] (1905) 134 Fed. 43, 13 A. B. R. 760.

such without notice of the incumbrance could object to its invalidity, and they only if they had obtained a lien. And a trustee in bankruptcy was held to be in effect a lien creditor, for, said the Court:

> "The estate of the bankrupt is devolved upon the trustee subject to the rights of other persons therein. . . . The court takes it into its exclusive dominion and control, and in harmony with the general principles of law governing the exercise of jurisdiction in such cases, it accords to every person who has an interest in the *res* the privilege of intervening and establishing his rights in the thing which has been seized. It does no such in iquity as to transfer from one who has done no act obnoxious to the law a right which belonged to him and give the fruits thereof to another who had no claim to it. Thus, in the present instance, a ruling that these subsequent creditors no longer have the protection given them by the statute, would not only deprive them of the priority which they have acquired, but would give the benefit of this deprivation to the secret lienholder, and the object of the statute is completely defeated. . . . The trustee . . . because he has the legal title to the assets and is charged with the duty of saving and protecting them, represents the general fund. He is not a purchaser, but as the title of his office imports, he is trustee for all who have interests, and according to those interests. He himself has no interest and there is nothing in his representation which stands between the court and those who have interests for the recognition and protection of which they appeal to its authority."

This is, we think, the clearest and most logical statement of the correct view that has yet appeared.

The Court recognizes, however, that the Economical Printing Co. case is *contra*, and distinguishes it as a decision on the State law. This distinction we do not find in the mind of the Court in that case. The criticism of the Sixth Circuit is: "If the Circuit Court of Appeals had not apparently held otherwise, we should have thought it doubtful whether the State court had gone so far as to hold that a seizure under legal process must necessarily be a seizure under the process of a court of law or of equity, as distinguished from the court in bankruptcy, which has power to seize the debtor's property and subject it to the claims of creditors according to their merit." The suggestion here made would seem to be unanswerable.

The question as to whether or not a trustee in bankruptcy may avoid transfers which under the State laws could only be avoided by lien creditors has, therefore, been passed upon favorably to the trustee's rights by the Circuit

Courts of Appeals for the Fourth, Sixth, Seventh and Eighth Circuits. The court in the Second Circuit has allowed the trustee's right in a conditional sale case, but denied it in a chattel mortgage case.[1]

The courts below have generally followed the majority view, but it is hardly necessary to discuss the cases in detail. In re Fraizer,[2] In re Galt,[3] In re H. G. Andrae Co.,[4] In re Carpenter,[5] In re Thorp[6] (an excellent opinion by the Referee), In re Butterwick,[7] In re Tweed,[8] Matter of Rasmussen.[9] *Contra*, In re Sewell[10] (disapproved by the Appellate Court in the Ducker case), and In re Beede[11] (an excellent opinion by Ray, District Judge, who, however, finds himself bound by the decision in the Economical Printing Co. case).

The question of the position of the United States Supreme Court on this point becomes, therefore, all-important. The exact question has never come before it.

In Hewit *v.* Berlin Machine Works,[12] we have a case of a conditional sale of certain machines to the bankrupt to be used in his manufacturing plant and not to be sold. The contract reserving title in the vendors was never recorded. The New York Statute (Laws of 1897, Chap. 418, Sec. 112), provided that such contracts should be void "as against subsequent purchasers, pledgees or mortgagees in good faith." The court held that a trustee in bankruptcy did not occupy the position of a purchaser, pledgee or mort-

---

[1] Since the above was written, there has been reported a decision of the Circuit Court of Appeals for the Fifth Circuit in Meyer Bros. Drug Co. *v.* Pipkin Drug Co. 14 A. B. R. 477. This decision holds that a trustee in bankruptcy does not occupy the position of a lien creditor, and cannot, therefore, avoid mortgages which such a creditor could avoid. The discussion on the points is, however, slight, and the only bankruptcy case cited is In re Economical Printing Co. supra.

[2] (1902) 117 Fed. 575, 9 A. B. R. 21.

[3] (1903) 120 Fed. 443, 9 A. B. R. 682.

[4] (1902) 117 Fed. 561, 9 A. B. R. 135.

[5] (1903) 125 Fed. 831, 11 A. B. R. 147.

[6] (1902) 130 Fed. 371, 12 A. B. R. 195.

[7] (1904) 131 Fed. 371, 12 A. B. R. 536.

[8] (1904) 131 Fed. 355, 12 A. B. R. 648.

[9] (1905) 136 Fed. 704, 13 A. B. R. 462.

[10] (1901) 111 Fed. 791, 7 A. B. R. 133.

[11] (1903) 126 Fed. 853, 11 A. B. R. 387.

[12] (1904) 194 U. S. 296, 11 A. B. R. 709.

gagee, and therefore could not take advantage of the invalidity. The decision is perfectly correct. There was no question of creditors being allowed to avoid the contract, or of the position of the trustee as the representative of creditors. No creditor could, under the statute, have objected, and it therefore followed that the trustee could not. The court, however, quoted and adopted the language of the court below in Re Economical Printing Co., and found that the decision in that case and in the court below here was "sustained by decisions under previous bankruptcy laws" and was "not shaken by a different result in cases arising in States by whose laws conditional sales are void as against creditors." This language, especially the quotation from the Economical Printing Co. case, is believed to be opposed to the best view, but it must be noted that it is entirely *obiter dicta*, and that the case itself is not in conflict with the decisions of the majority of the Circuit Courts of Appeals on the question under discussion.

We come then to Thompson *v.* Fairbanks,[1] which has been briefly referred to above. This was an appeal from the Supreme Court of Vermont in an action brought by the trustee in bankruptcy of one Moore against Fairbanks to recover the value of certain property alleged to belong to the trustee. Moore had made a chattel mortgage on livery stable stock to Fairbanks in 1891, which specifically covered after-acquired property and which gave Moore authority to sell. The mortgage was duly recorded, but would not under the State law have covered after-acquired property if the mortgagee had not, in May, 1900, and within two months of the filing of the petition in bankruptcy, taken possession of the property. The mortgagee was allowed to retain the proceeds of the chattels. The decision may be placed upon the ground that, in the absence of any finding of fraudulent intent, the case was not one of a voidable preference, and depended, therefore, entirely upon the validity of the transaction under the State law. And in Vermont, "possession, when taken (if it be before the lien of the attaching or execution creditor), brings the property under the cover and operation of the mortgage as of its

[1] (1905) 196 U. S. 516, 13 A. B. R. 437.

date,—the time when the right of possession was first acquired." The case may, therefore, be regarded as a decision involving only a question of State law.

The court, however, cites In re Garcewich,[1] as authority for the statement that "Under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the act." This is a broader statement than can be well supported, but it was not necessary to the decision of the case.

Two things may be noted with respect to this case. First, it would have been easy for the court of original jurisdiction to have made a finding of fact that the mortgage, so far as after-acquired property was concerned (the only question involved, for it had been properly filed) was constructively fraudulent as to creditors. This would have allowed the whole question to be decided under Section 70a (4) and would have brought the case in line within In re Ball and Matthews *v.* Hardt.[2] Secondly, the present decision draws a very narrow line between its rule and that in Wilson *v.* Nelson.[3] The latter case involved the question of whether or not a sale under execution upon a judgment entered on an irrevocable warrant of attorney to confess judgment, constituted a preference. The warrant of attorney had been executed thirteen years before, but the court held that the bankrupt had thereby "suffered or permitted" the entry of a judgment which resulted in an unlawful preference. This was forbidden by the Bankruptcy Act. In Thompson *v.* Fairbanks, on the other hand, it was held that under the State law the taking possession was to be treated as relating back to the time when the right to do so was created, which was, of course, beyond the four months period. The justification of the latter decision must, therefore, be placed upon the ground that the State law was controlling,—a justification that, it is to be feared, will in

---

[1] (1902) 115 Fed. 87, 8 A. B. R. 149. [2] Supra.

[3] (1901) 183 U. S. 191, 7 A. B. R. 142.

the future be stretched almost to the breaking point. If, however, the resulting confusion should result either in a modification of the doctrine of Etheridge *v.* Sperry,[1] that chattel mortgages are to be interpreted solely by State law, or, preferably, in some legislative enactment which will give both creditors and mortgagees, respectively, uniform rights in all the United States, the result will hardly be dearly bought at any price.

We come finally to the case of Humphrey *v.* Tatman.[2] That was a case of an unfiled chattel mortgage, where the mortgagee took possession a month prior to the filing of the petition. The Supreme Court found that under the Massachusetts law such taking of possession gave the mortgagee a good title against creditors, and it therefore held it to be good against the trustee under the doctrine of Thompson *v.* Fairbanks.

The remarkable thing about this decision is that by it the Supreme Court of the United States reversed the decision of the Supreme Judicial Court of Massachusetts.[3] The Massachusetts Court had decided that the taking possession within the four months period constituted a voidable preference under the Act of 1898, and especially under Wilson *v.* Nelson,[4] thus falling into the very confusion which has just been suggested. The United States Court does not mention Wilson *v.* Nelson, but in effect holds that there can be no unlawful preference where the mortgagee's title is good under the State law as against a trustee in bankruptcy.

It is believed that the Massachusetts view is much to be preferred. Under the United States view, it is perfectly possible for a debtor to prefer a creditor by giving him a mortgage which may remain unrecorded for four months, but which may be rendered valid by the simple operation of having the creditor take possession before the filing of a petition. The only redress of the trustee would be by proof of actual fraudulent intent on the part of the debtor. How difficult it would be to prove this may be seen from such a case as Matter of Hunt.[5] The situation is one which

[1] Supra. [2] (1905) 198 U. S. 91, 14 A. B. R. 74.

[3] See Tatman *v.* Humphrey (1903) 184 Mass. 361, 12 A. B. R. 62.

[4] Supra. [5] (1905) 139 Fed. 283, 14 A. B. R. 416.

would seem, however, to need urgent legislative attention.

Upon the general question under discussion in this article—whether a trustee in bankruptcy can avoid transfers or encumbrances which could be avoided by lien creditors under the State law—we find, therefore, no decision by the Supreme Court of the United States. The dicta, however, in Hewit *v.* Berlin Machine Works and in Thompson *v.* Fairbanks would seem to indicate a tendency on the part of the court to follow the rule adopted under the Act of 1867, and to deny the trustee's right to avoid transfers which the bankrupt could not have avoided, except in cases of fraud, and similar instances specifically provided for in the Act of 1898. As affecting this tendency we have, on the one hand, the very general, though not unanimous, concurrence of the Circuit Courts of Appeals and, on the other, the lack of agreement among those courts as to the grounds for their decision.

ELLICOTT D. CURTIS.